

**Alert | Environmental**



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## ***Martinez v. Colorado Oil and Gas Conservation Commission Update***

On Jan. 14, 2019, the Colorado Supreme Court held in *Martinez v. Colo. Oil & Gas Conservation Comm'n*, that the Colorado Oil and Gas Conservation Commission (Commission) properly denied a petition requesting that it adopt a rule that would halt the drilling of oil and gas wells for the foreseeable future.

The Supreme Court's decision reinforces the Commission's authority to regulate public health and environmental concerns, but not to the detriment of its charge to foster responsible, balanced development of the resource. A likely outcome of the decision will be proposed legislation seeking to alter the balance of current law, and further requests to the Commission for rulemaking to give local governments and other stakeholders more opportunities to address the issues raised in this case.

Taking its lead from the Colorado Oil and Gas Conservation Act (Act), the Supreme Court held the Commission is required "(1) to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and (2) in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, but only after taking into consideration cost-effectiveness and technical feasibility."

The case began in 2013 when a group of self-described youth activists (Youths) filed a petition with the Commission requesting it adopt a rule that precludes the Commission from issuing any permits for the drilling of oil and gas wells "unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other

actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.”

The Commission denied the petition in a 2014 order, stating it did not possess the authority to either adopt a rule which readjusts the balance struck by the General Assembly in the Act or condition new oil and gas drilling on a finding of no cumulative adverse impacts. The Commission’s order also stated it was currently addressing many of the concerns in the petition, it had other priorities which took precedence over the petition, and authority over air quality belonged to the Colorado Department of Public Health and Environment.

Upon review, the Denver District Court upheld the Commission’s decision, and the Youths appealed. The Colorado Court of Appeals reversed the lower court, finding the statutory scheme required consideration of public health, safety, and welfare “as a determinative factor.” The Colorado Supreme Court accepted the case, reversed the Court of Appeals, and found the Commission properly declined to engage in rulemaking to consider the Youths’ proposed rule.

The litigants focused on a provision in the Act’s legislative declaration that states, “It is declared to be in the public interest to: [f]oster the responsible, *balanced* development, production, and utilization of the natural resources of oil and gas in the state of Colorado *in a manner consistent* with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.” C.R.S. Section 34-60-102(1)(a)(I) (emphasis added).

Both sides argued that this language is clear and unambiguous and supports their respective positions. The Commission asserted the language requires it to balance oil and gas development with the protection of public health and the environment. The Youths countered that the phrase “in a manner consistent with public health, safety, and welfare” does not indicate a balancing test but rather establishes a prerequisite that must be fulfilled. The District Court agreed with the Commission, and the Court of Appeals agreed with the Youths. However, the Supreme Court concluded that since the litigants and the lower courts all interpreted this language differently, its meaning “is reasonably susceptible of multiple interpretations” and is therefore ambiguous.

Applying the rules of statutory construction, the Supreme Court analyzed the Act’s provisions in the context of the Act as a whole and reviewed the legislative history, including testimony of bill sponsors regarding various amendments that incorporated provisions into the Act for the protection of public health, safety, welfare, and the environment.

The Supreme Court found the Colorado General Assembly’s intent in amending the legislative declaration was not to create a condition precedent to further oil and gas development, but to minimize adverse impacts to public health and the environment while ensuring that oil and gas development could proceed in an economical manner. In other words, the Commission’s charge is to pursue multiple policy goals and not condition one legislative objective on the satisfaction of another.

The Supreme Court identified Section 34-60-106(2)(d) as a provision of the Act authorizing the Commission to regulate oil and gas operations to avoid “and mitigate significant” adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, “taking into consideration cost-effectiveness and technical feasibility.” Although these concerns are an important component of the Commission’s role in overseeing oil and gas development, the Supreme Court determined that “this statutory language envisions some possible environmental and public health risks.”

In the Supreme Court's view, the Act's provisions neither allow the Commission "to condition all new oil and gas development on a finding of no cumulative adverse impacts to public health and the environment," nor do they create "a balancing test by which the public's interest in oil and gas development is weighed against its interest in public health and the environment."

Although the Supreme Court's ruling preserves the status quo of the current regulatory program, legislators who are unhappy with the decision are already drafting bills to undermine it. The regulated industry needs to be vigilant in the coming months (and years), monitoring proceedings and participating in any attempts to modify the Commission's charge to address health and environmental concerns, while taking cost and technical feasibility into account. Industry participation in the legislative and rulemaking processes is critical now to ensure a fairer outcome supportive of its interests.

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